

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

GRAHAME PLAUNT and KENNETH L.W. BOLAND

Plaintiffs

- and -

RENFREW POWER GENERATION INC.

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

**FACTUM OF THE DEFENDANT,
RENFREW POWER GENERATION INC.**
(Decertification Motion Returnable January 25, 2017)

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PART I – OVERVIEW

1. The class members are property owners around the perimeter of Round Lake near Renfrew, Ontario. Renfrew Power Generation (“**RPG**”) operates a hydro-electric dam at the outlet of Round Lake, which dam serves to regulate the water levels in Round Lake for a variety of purposes.

2. The Plaintiffs brought this class action for trespass claiming encroachment onto their properties of water from the lake. RPG’s operations are governed, in part, by licences of occupation granted by the Province almost a century ago pursuant to which RPG and its predecessor, Ontario Hydro, were permitted to raise the water levels in Round Lake in connection with the construction and operation of the dam. The Plaintiffs say that any water crossing the contour line associated with the maximum permitted water level at the 107.5 foot elevation (the “**107.5 Contour**”)¹ as it existed in 1917 when the licences of occupation were granted, constitutes a trespass. The result of this position, as the Plaintiffs contend, is that even if RPG did not raise the levels of Round Lake above 107.5 feet, if any shoreline erosion has occurred over the past 100 years which in turn caused water to extend beyond the 107.5 Contour, RPG is liable in trespass.

3. The Plaintiffs moved for certification in March 2011 (the “**Certification Motion**”). This Honourable Court did not grant certification on any of the common issues initially sought by the Plaintiffs. However, based upon oral submissions made at the Certification Motion, the Court certified a common issue that sought to determine whether the 107.5 Contour was a legal

¹ As discussed below at paragraphs 14 and 15, only one licence of occupation makes reference to a 107.5 foot elevation; the other licences indirectly refer to a 108 foot elevation.

property line for the purposes of determining whether any trespass had occurred on the class members' properties.² This question was based on the assumption that the 107.5 Contour is common to all of the class members' properties such that if the common issue was answered in the affirmative (namely, that the 107.5 Contour in 1917 did create a property line), it would advance the claim of all class members.

4. However, the evidence filed thereafter, including in respect of this motion, has conclusively established that:

- (a) The 107.5 Contour is not relevant to a determination of the property boundaries of all of the class members' properties. The Plaintiffs cannot say which class members' properties, or how many, are defined with reference to the 107.5 Contour.
- (b) There must be a property by property investigation to determine how the present-day boundaries of the class members' properties are defined and whether they are commensurate with the 107.5 Contour.
- (c) Even if the boundary line of certain properties is determined to be the 107.5 Contour, the location of that contour line on the ground (rather than where it is drawn on a plan or map) will have to be determined separately for each property. There is a wide variety of evidence that a qualified surveyor would use to locate these boundaries which will vary from property to property.

5. It is now indisputably shown to be the case that the Common Issue is neither a necessary nor substantial ingredient for the resolution of each class member's claim. It is also indisputably the case that determining the property boundaries of the class members' properties and determining whether water has encroached onto these properties involves a separate inquiry for each property. The determination of any class member's property boundaries will not be

² For purposes of the within motion, RPG has distinguished between the legal issue of whether a contour line can, in law, establish a fixed legal property line (which RPG says it cannot and is the question which has been certified as the common issue in this action) and the factual issue of whether the 107.5 Contour is, as a factual matter, commensurate with the class members' property boundaries. The within motion is primarily concerned with the latter issue, although elements of the argument are clearly also relevant to answering the ultimate common issue.

determinative of any other class member's boundary, and certainly will not be determinative for the class as a whole. Thus, contrary to the objectives of the *Class Proceedings Act 1992*, S.O. 1992, c.6 (the "CPA") and the requirements for certification of a class proceeding, there is no longer any question that is common among the class members, nor is the class proceeding the preferable procedure for the resolution of the common issues. The resolution of the sole Common Issue will not sufficiently advance the litigation as the Court will in any case be left conducting hundreds of discrete trials to establish essential elements of each class member's trespass claim. This class action, therefore, will neither answer a question which will advance all class members' claims or result in judicial economy and a saving of resources.

PART II – THE FACTS

Round Lake, the Tramore Dam and RPG

6. Round Lake is part of the Bonneshere watershed, a series of rivers and lakes immediately east of Algonquin Provincial Park and lying within the Townships of Hagarty and Richards. These Townships were first surveyed by Robert Hamilton in August 1862. Among other things, the survey demonstrates that a 66 foot ("one chain") shore road allowance was laid out around the entire shore of Round Lake between the water's edge and the upland property.³

³ Report of I.deRijke dated March 25, 2014 ("**2014 deRijke Report**") at paras. 3.1 - 3.3, Motion Record Vol.I, Tab 2A, p.17

7. When patentees acquired titled to the township lots from the Crown, they did not acquire title to the water's edge. Instead, they only acquired title to the upland limit of the shore road allowance.⁴

8. The Tramore Dam (the “**Dam**”) was constructed at the east end of Round Lake in 1913 to supply electricity to industrial operations in the Town of Renfrew. The Dam controls the flow of water out of but not into Round Lake.⁵

9. As a result of the flooding caused by the operation of the Dam, the margins of Round Lake have changed. The current boundaries of the lake are only approximately 100 years old and continue to evolve. The topography and geography of the shoreline varies around the entire lake. Some parts are marshy, others feature vegetated sandy banks and still others include rocky outcrops. There are currently approximately 450 cottages around the lake.⁶

⁴ 2014 deRijcke Report at para. 5.5, Motion Record Vol. I, Tab 2A, p.24; Stewart Cross-Examination held on November 29, 2016 (“**Stewart Cross-Examination**”) at p.17, Q.43-45, p.20, Q.59, p.33, Q.103-105, p.44-45, Q.146, p. 65, Q.223-224, Supplementary Motion Record Vol. I, Tab 2, p. 25, 28 and 41.

⁵ *Plaunt v. Renfrew Power Generation Inc.*, [2011] O.J. No. 2995 (Ont. SCJ) (the “**Certification Decision**”) at paras. 2 and 16, Motion Record Vol.I, Tab 6, p.147-149

⁶ Certification Decision at paras. 9, 14 and 17, Motion Record Vol.I Tab 6, p.148-149. Based on his review of the block maps, Mr. deRijcke estimates that there are approximately 400 separate properties around the perimeter of Round Lake. (Report of I.deRijcke dated June 1, 2016 (the “**2016 deRijcke Report**”) at para. 1.3, Motion Record Vol.I, Tab 2B, p.47; Cross-Examination of Mr. DeRijcke on November 30, 2016 (“**deRijcke Cross-Examination**”) at p.38, Q.140-142, Supplementary Motion Record Vol. IV, Tab 3, p. 646.)

The Plaintiffs tendered evidence from a property owner on Round Lake to suggest that, based on his assessment of the tax roll numbers prepared by MPAC, there are approximately 522 properties contiguous to Round Lake. Mr. deRijcke has indicated that using tax roll numbers is a less reliable method of identifying the number of property owners because it is not related to the actual parcel fabric or PIN configuration of the parcels. For example, there could be multiple tax roll numbers within one individual property because of leases. (Report of I.deRijcke dated October 13, 2016 (“**2016 deRijcke Reply Report**”) at para. 1.1, Supplementary Motion Record Vol. I, Tab 1, p.3; DeRijcke Cross-Examination at p.42-43, Q.161-165, Supplementary Motion Record Vol. IV, Tab 3, p. 650-651.)

10. The dam is currently owned and operated by RPG. RPG is a for-profit corporation owned by the Municipality of Renfrew whose primary business is the generation of hydroelectricity in Ontario. It generates electricity through its use of water flowing through the Bonnechere River and is involved in the management of the watershed.⁷

11. In 2004, the Minister of Natural Resources imposed a Water Management Plan (the “WMP”) for the watershed and since that time, RPG has been required to operate the Dam and maintain the level of Round Lake within the WMP guidelines, which are intended to achieve objectives not limited to the production of electricity. For example, one of the significant elements in the WMP is the requirement that RPG maintain a minimum water level in Round Lake during the winter months to allow fish to spawn in the spring.⁸

Various Instruments Through which RPG Obtained Flooding Rights

12. Some of the lands which would be flooded as a result of the operation of the Dam were Crown lands, while others were privately-owned. In anticipation of the flooding that would occur as a result of the construction and operation of the Dam, Hydro Electric Power Commission of Ontario (whose rights were later assigned to RPG) (“HEPC”)⁹ purchased certain lands around Round Lake and acquired flooding privileges in respect of other lands. As described in the expert reports filed after the Certification Motion, these acquisitions were effected through a variety of

⁷ Certification Decision at paras. 2 and 10, Motion Record Vol.I, Tab 6, p.147-148

⁸ Certification Decision at para. 4, Motion Record Vol.I, Tab 6, p.147

⁹ Prior to the 1930s, the Dam was owned and operated by HEPC (which later became known as Ontario Hydro). In or around the 1930s, HEPC transferred the Dam to the Hydro-Electric Power Commission of the Town of Renfrew. Upon the enactment of the *Energy Competition Act, 1998*, the Hydro-Electric Power Commission of the Town of Renfrew was restructured such that RPG was responsible for the generation of energy while Renfrew Hydro Inc. was responsible for its distribution. (Certification Decision at paras. 12 and 19, Motion Record Vol.I, Tab 6, p.148-149)

instruments: licences of occupation, Crown grants, grants from private land owners and grants of easements.¹⁰ There was no single method by which HEPC acquired flooding rights; nor was there a single method by which ownership rights were conveyed to those who became the private owners of upland parcels.¹¹

13. HEPC obtained flooding rights to some of the lands from the Ministry of Natural Resources through a number of licences of occupation.¹² A licence of occupation does not create an estate in land, but is a contractual right.¹³ The flooding right granted in the licences of occupation defined that right by reference to permission to raise the water level to a certain elevation. This, in turn, would produce a “contour line” around the lake at the anticipated point of intersection between the surface of the water and the topography as it existed on the date the permission to raise the water level was given.

¹⁰ Report of R.Stewart dated August 19, 2016 (“**2016 Stewart Report**”) at para. 3.1, Exhibit 2 to Stewart Cross-Examination, Supplementary Motion Record Vol. III, Tab 2B , p.560

¹¹ 2014 deRijke Report at para. 3.8, Motion Record Vol.I, Tab 2A, p.18; 2016 Stewart Report at para. 3.1, Supplementary Motion Record, Vol. III, Tab 2B , p. 560; Stewart Cross-Examination at p.42-45, Q.136-146 and p.68-70, Q.241-243, Supplementary Motion Record Vol. I, Tab 2, p.50-53 and 76-78; Report of R. Stewart dated August 31, 2013 (the “**2013 Stewart Report**”) at Exhibits 14, 20, 21, 25, 29, 32, 34 and 36, Supplementary Motion Record Vol. II and III, Tab 2A (14), (20), (21), (25), (29), (32), (34) and (36) , p. 425-427, 445, 446-456, 466, 478, 480, 483-486 and 488.

¹² 2016 Stewart Report at paras. 2.2 and 2.3, Supplementary Motion Record Vol. III, Tab 2B, p. 559. All of the 1917 licences were subsequently replaced by other licences of occupation which were in substantially the same form as the original ones. (2013 Stewart Report at paras.D.3.1 – D.3.17, Supplementary Motion Record Vol. I, Tab 2A, p. 138-143.)

¹³ 2014 deRijke Report at paras. 4.5-4.8 and 6.1-6.9 and 7.1-7.3, Motion Record Vol.I, Tab 2A, p.20-21 and 28-31; 2013 Stewart Report at paras. B.4-B.5, Supplementary Motion Record Vol. I, Tab 2A, p. 119; Stewart Cross-Examination at p.45-46, Q.149-151; p.48-49, Q.156 and 158-161, Supplementary Motion Record Vol.I, Tab 2, p.53-54 and p.56-57.

14. One of these licences of occupation, Licence No. 8281, which was issued in 1974¹⁴, authorized the construction of the Dam and permitted HEPC to raise the level of Round Lake and to flood all unalienated Crown lands adjacent to Round Lake to an elevation of 107.5 feet (which is 4.5 feet below the top of the dam).¹⁵ There is no mention of a “contour line” in this licence of occupation (especially not a line dating back to 1917). Instead, the 107.5 Contour that is at issue in this proceeding is a reference to the line that is traced out along the surface of the land if the water of Round Lake was raised to the 107.5 foot elevation.

15. The other licences of occupation were issued in 1917 and authorized flooding of lands that were technically Crown property but were subject to the rights of locatees.¹⁶ None of these licences of occupation make direct reference to a flooding elevation (or to a contour line), but instead, authorize flooding up the “new high water level” as shown on plans by Ontario Land Surveyor E.J. Boswell which identify the new high water level as being “6 ft above the low water line March 1911” which, in turn, translates into an elevation of 108 feet.¹⁷

¹⁴ Licence No. 8281 was issued in 1974, replacing Licence No. 7583 which was issued in 1961. (See Exhibits 3 and 37 to the 2013 Stewart Report, Supplementary Motion Record Vol. I and III, Tab 2A (3) and (37), p.250-256 and 489-495.) The Plaintiffs have not identified the licence of occupation granted at the time of the initial flooding, if there was one. (Mr. Stewart does not refer to any licence of occupation relating to the construction and operation of the Dam that precedes Licence No. 7583. See 2013 Stewart Report at paras. D.3.16 – D.4.3, Supplementary Motion Record Vol. I, Tab 2A, p. 143-144.)

¹⁵ Certification Decision at para. 3, Motion Record Vol. I, Tab 6, p.147; Licence of Occupation No. 8281, Exhibit 3 to the 2013 Stewart Report, Supplementary Motion Record Vol.I, Tab 2A (3), p.250-256

¹⁶ 2016 Stewart Report at para. 1.4, Supplementary Motion Record Vol.III, Tab 2B, p.559. Locatees are permitted by the Crown to occupy Crown land and, if certain conditions are satisfied, may subsequently become patentees.

¹⁷ 2013 Stewart Report at para. B.10, footnote 32 and Exhibits 11, 15, 16, 17, 22, 23, 26 and 27, Supplementary Motion Record Vol. I, II and III, Tab 2A and 2A(11), (15), (16), (17), (22), (23), (26) and (27), p.120, 137, 363-366, 428-442, 457-464 and 467-476; 2016 Stewart Report at para. 2.3, Supplementary Motion Record Vol. III, Tab 2B, p.559; Stewart Cross-Examination at p.65-66, Q.225-226, Supplementary Motion Record Vol. I, Tab 2, p.73-74. The low water line in March 1911 was approximately 102.2 feet (6 ft above this line results in an 108 foot elevation) (2013 Stewart Report at para. B.11, Supplementary Motion Record Vol. I, Tab 2A, p. 120.)

16. Mr. Boswell was contracted to prepare various plans of survey of Round Lake in 1917 depicting, on a two-dimensional map, where a hypothetical 108 foot contour line would be at that time (the “**Boswell Line**”). Although Mr. Boswell’s field notes are unavailable, it appears that the surveys were based on field work that he conducted in or about March 1911.¹⁸ (It also appears that Mr. Boswell may have relied on – or even prepared – a separate survey for HEPC dated June 10, 1911, although this is not known for certain as the 1911 HEPC plan is unsigned.)¹⁹ Despite Mr. Boswell’s identification on his plans and sketches of a contour line, it is the actual line on the ground as found by a surveyor today, and not its depiction on a map, that identifies the boundary of a property.²⁰ The Boswell Line and any measurements associated therewith are merely evidence used by surveyors in finding the boundary.

17. In contrast to the licences of occupation, the Crown grants to HEPC of other properties around Round Lake make no reference to a flooding elevation, to any contour lines, to the Boswell Line or to flooding rights at all. Instead, the boundaries of the properties granted to

The 107.5 Contour is not applicable to all of the licences of occupation granted to HEPC as most of the licences refer to a 108-foot elevation. Although the difference might seem miniscule, the Plaintiffs’ own expert confirmed that even small changes in the elevation could result in significant changes in the location of the contour line on the ground. (Stewart Cross-Examination at p.70, Q.244-245, Supplementary Motion Record Vol. I, Tab 2, p.78.) In addition, there is also no uniform contour line used in the Crown Grants to private upland owners – see, for example, 2013 Stewart Report at Exhibit 14, Supplementary Motion Record Vol. II, Tab 2A (14), p.425-427 and Stewart Cross-Examination at p.69-70, Q.242-243, Supplementary Motion Record Vol. I, Tab 2, p. 77-78).

¹⁸ 2014 deRijcke Report at para. 3.9, Motion Record Vol. I, Tab 2A, p.19; 2013 Stewart Report at para. D.5.4, Supplementary Motion Record Vol. I, Tab 2A, p.145

¹⁹ 2016 Stewart Report at para. 2.3 and footnote 6, Supplementary Motion Record Vol. III, Tab 2B, p.559; Stewart Cross-Examination at p.19, Q.54, Supplementary Motion Record Vol. I, Tab 2, p.27

²⁰ 2016 deRijcke Report at paras. 3.2-3.4, Motion Record Vol.I, Tab 2B, p.51-53; 2013 Stewart Report at para. D.6.1, Supplementary Motion Record Vol. I, Tab 2A, p. 149; Stewart Cross-Examination at p.48-50, Q.158-163, Supplementary Motion Record Vol. I, Tab 2, p. 56-58

HEPCO are defined using metes and bounds descriptions.²¹ The boundaries of these properties are not defined by either the licences of occupation or any contour lines associated therewith.

18. In addition, in respect of a number of lots around Round Lake, HEPC was not required to obtain any flooding rights because in respect of these properties, the water, if raised to the 107.5 foot elevation, would not exceed the inner limit of the 66 foot shore road allowance and encroach on the upland owner's or locatee's property.²²

Subsequent Acquisitions by Private Owners

19. Over time, ownership of the lands around Round Lake passed from the Crown to private land owners. As noted in paragraph 7 above, the conveyance of a lot would not convey title to the water's edge but only to the inner limit of the shore road allowance. In those cases in which the area to be flooded by HEPC would not reach the privately-owned land but would be within the shore road allowance, there was no need for a transfer of lands to HEPC and the limit of those lots remained defined as the limit of the shore road allowance.²³

²¹ 2016 Stewart Report at paras. 3.2 and 6.2, Supplementary Motion Record Vol. III, Tab 2B, p. 560 and 563; Stewart Cross-Examination at p.66, Q.227, Supplementary Motion Record Vol. I, Tab 2, p.74

²² Stewart Cross-Examination, p.42-45, Q.136-146, Supplementary Motion Record Vol.I, Tab 2, p.50-53; 2016 Stewart Report at paras. 5.3, 6.8 and 6.9, Supplementary Motion Record Vol.III, Tab 2B, p.563-565.

²³ 2016 Stewart Report at paras. 5.3, 6.8 and 6.9, Supplementary Motion Record Vol. III, Tab 2B, p. 563-565; Stewart Cross-Examination, p.42-45, Q.136-146, p.94-96, Q.337-339 and p. 97, Q.342-343, Supplementary Motion Record Vol. I, Tab 2, p.50-53 and 102-105; also see the uncoloured areas identified on Exhibit 5 to the Stewart Cross-Examination, Supplementary Motion Record Vol. IV, Tab 2E, p.587; PLA0000008, PLA0000131 and PLA0000134, Supplementary Motion Record Vol. IV, Tab 5 (A), (I) and (J), p.751, 768-774

In recent years, some of these owners have made applications to acquire the land within the shore road allowance between their property boundary and the shoreline. It is not known in how many cases this has happened, but in the examples from the productions and expert reports, the proposed new property boundary would not be the Boswell Line, but the shoreline as it existed at some later point in time or at the time of the survey. (Stewart Cross-Examination, p.73-75, Q.256-265; p.76-77, Q.269-273; p.79-80, Q.284-286 and Q.290; p.96-98, Q.341-346, Supplementary Motion Record Vol I, Tab 2, p. 81-85, 87-90 and 104-106; 2016 deRijcke Report at Appendix 9

20. In other cases, the grants to the private owners would have been to the limit of HEPC's lands acquired from the Crown by metes and bounds descriptions.²⁴

21. In others, the grants to the private owners were defined by reference to the flooded area, but in various ways. In some, by way of example, it was a reference to "water's edge" or "high water mark"²⁵, while in others, it was a reference to the "controlled water's edge" or 108 contour as of the date of the survey, but in none of these examples was it set with reference to the 1917 Boswell Line.²⁶

Where is the Boswell Line?

22. The Plaintiffs assert that the Boswell Line constitutes a boundary line and is fixed and remains in its original location, even if the shoreline erodes and the contour line associated with the 107.5-foot flooding elevation is in a different place today.

(select surveys), 12, 13 and 15, Motion Record Vol.I, Tab 2B(9), (12), (13) and (15), p.107, 109, 112B, 112C, 112F, 117, 118 and 120; DeRijcke Cross-Examination at p.77-78, Q.293-294; p.81, Q.313-314; p.87-88, Q.344-348; p.89-90, Q.353-358; p.91-92, Q.364-367; p.96-97, Q.388-389, Supplementary Motion Record Vol. IV, Tab 3, p. 685-686, 689-690, 695-700 and 704-705; Re-Examination of Mr. DeRijcke on November 30, 2016 at p.11, line 16 to p.12, line 1; p.13, Q.22-23, p.15-16, Q.32, p.16-17, Q.34-36, p.18, Q.37, Supplementary Motion Record Vol. IV, Tab 4, p.742-744 and 746-749)

²⁴ 2016 Stewart Report at Tabs 2 and 6, Supplementary Motion Record Vol. III, Tab 2B (2) and (6), p. 569 and 582; PLA0000049, PLA0000050, PLA0000051, RPG0000037, PLA0000035, PLA0000054, RPG0000056, RPG0000057, PLA0000026, Supplementary Motion Record Vol. IV, Tab 5(B), (D), (E), (F), (G), (H), (N), (O), (P) p. 752-755, 757-760, 787-794; Stewart Cross-Examination p.86-88, Q.306-313, p.91-92, Q.320-326, p.93-94, Q.331 and 335, p.99, Q.351-353, Supplementary Motion Record Vol. I, Tab 2, p.94-96, 99-102 and 107.

²⁵ These terms typically connote an ambulatory boundary, which is not fixed but varies with erosion and accretion. (Stewart Cross-Examination at p.62-63, Q.214-219, Supplementary Motion Record Vol.I, Tab 2, p.70-71; 2013 Stewart Report at paras. B.13, D.5.14 and D.5.15, Supplementary Motion Record Vol. I, Tab 2A, p. 122 and 148)

²⁶ 2016 deRijcke Report at paras. 5.2.1, 5.2.1.2, 5.4.1 and Appendix 7, 9 (select surveys) and 13, Motion Record Vol.I, Tab 2B (7), (9) and (13), p.56-57, 101, 108, 111 and 118; deRijcke Cross-Examination at p.83-84, Q.320-323, Supplementary Motion Record Vol. IV, Tab 3, p.691-692; deRijcke Re-Examination at p.12-13, Q.20-21; p.13-14, Q.24-26, Supplementary Motion Record Vol. IV, Tab 4, p.743-745

23. Leaving aside the legal issue of whether this proposition is correct or not and the fact that the 107.5 Contour Line is irrelevant to some properties, it is uncontested that determining the original location of the Boswell Line is a complex undertaking that must be done on a property by property basis. The factors to be considered for each property include: the type of vegetation; type of soil/rock at that specific site; orientation of the property on the lake in terms of direction of prevailing winds and waves; slope of the dry land topography; slope of the bathymetry of the lake immediately in front of the shoreline; man-made structures which may have aggravated or attenuated erosion.²⁷

24. While there may be some evidence in common for certain proximate properties, each must be separately determined.²⁸ The Licences of Occupation are but one piece of that evidence.²⁹

The Certification Motion and Post-Certification Events

25. The Plaintiffs initially sought to have three common issues certified at the Certification Motion, but none of the proposed issues were certified. Instead, at the Certification Motion, Plaintiffs' counsel raised as a possible common issue, for the first time, the issue of the nature and effect of the contour line associated with the licences of occupation. As noted by this Court,

²⁷ 2014 deRijcke Report at paras. 7.6 and 7.7, Motion Record Vol.I Tab 2A, p.31-32; Stewart Cross-Examination at p.50-52, Q.168-179, Supplementary Motion Record Vol. I, Tab 2, p.58-60

²⁸ 2014 deRijcke Report at paras. 1.3.14, 5.1-5.4, 5.12, 5.17 and 9.1, Motion Record Vol.I, Tab 2A, p.16, 22-24, 26-27 and 34; 2013 Stewart Report at paras. A.2 and D.6.6, Supplementary Motion Record Vol. I, Tab 2A, p.117 and 150; 2016 Stewart Report at para. 5.2, Supplementary Motion Record Vol. III, Tab 2B, p. 562-563; Stewart Cross-Examination at p.34-35, Q.108-111 and p.40-41, Q.129-131 and Q.133, Supplementary Motion Record Vol. I, Tab 2, p.42-43 and 48-49

²⁹ 2013 Stewart Report at para. D.6.6, Supplementary Motion Record Vol. I, Tab 2A, p.150; Stewart Cross-Examination at p.51-53, Q.171-182, Supplementary Motion Record Vol.I, Tab 2, p. 59-61

“the claim by the plaintiffs did not contain an allegation that the Licence of Occupation created a new property line between public and private lands” and this was only clarified in oral submissions at the Certification Motion.³⁰ For this reason, there was little evidence at the Certification Motion regarding the factual or legal relevance of the 107.5 Contour on the class members’ property boundaries.

26. Based on class counsel’s assertion at the Certification Motion, this Court certified the action as a class proceeding with the only common issue being as follows (the “**Common Issue**”):

“Are the Plaintiffs entitled to a declaration that the Licenses of Occupation granted to the Defendant or its predecessors by the Ministry of Natural Resources are to be interpreted such that the contour line, if any, at the 107.5-foot elevation referred to therein established a fixed property line between public and private lands, which defines the legal boundaries of the class members’ properties for the purpose of determining the claims of trespass advanced herein?”³¹

27. The assumption underlying the Common Issue was that the licences of occupation and the associated contour lines were in fact common to all class members’ properties. The Court was under the apprehension that an interpretation of the licences of occupation would apply to all the class members.³²

³⁰ Reasons of Smith J. dated October 3, 2011 re: costs (“**Costs Decision**”) at paras. 4 and 5, Motion Record Vol.I, Tab 7, p.168; Certification Decision at paras. 97 and 98, Motion Record Vol.I, Tab 6, p.161; Certification Order at para. 5, Motion Record Vol.I, Tab 5, p.141

³¹ Certification Order at para. 4, Motion Record Vol.I, Tab 5, p.140-141

³² Certification Decision at paras. 99-100, 105, 110, 113 and 120, Motion Record Vol.I, Tab 6, p.161-164

This was the assertion of class counsel at the Certification Motion and was accepted by the Motions Judge. Without

28. The class, as certified, is defined as follows:

- (a) all persons who, on September 15, 2008, owned lands contiguous to Round Lake, an Ontario Lake fed by the Bonnechere River, including lands contiguous to Round Lake where a narrow strip of notionally reserved land (false road allowance) exists or where applicable, reserved land (a road allowance) exists between the legal description of the lands and the lake edge; and
- (b) all persons who, on September 15, 2008, owned lands contiguous to the Bonnechere River from Round Lake to the Tramore Dam, including lands where a narrow strip of notionally reserved land (false road allowance) exists or where applicable, reserved land (a road allowance) exists between the legal description of the lands and the lake edge.³³

29. Since the Certification Motion, a number of developments have occurred in the action, including the following:

- (a) 182 class members (representing 79 properties) have opted out of the class proceeding³⁴;
- (b) The pleadings were finalized: on December 7, 2011, the Plaintiffs served a Fresh Statement of Claim incorporating various amendments made up to that point, including the incorporation of the allegation raised by the Plaintiffs at the Certification Motion that the 107.5 Contour referenced in the license of occupation created a geographically fixed property line between public and private lands; RPG served its Statement of Defence on January 20, 2012; and the Plaintiffs served a Reply on April 3, 2012;
- (c) In June 2012, the parties exchanged Affidavits of Documents and documentary productions relating to the Common Issue;
- (d) On March 20, 2013, Smith J. ordered a modified trial as the appropriate procedure to determine the Common Issue³⁵;

this assumption, there could not have been a common issue. The Court cannot certify as a common issue the question of whether there is a common issue.

³³ Certification Order at para. 1, Motion Record Vol.I, Tab 5, p.140

³⁴ Affidavit of K.Tam sworn July 24, 2012 at para. 5, Motion Record Vol.I, Tab 4, p.130-137

³⁵ Reasons of Smith J. dated March 20, 2013, Supplementary Motion Record Vol. IV, Tab 6

- (e) The Plaintiffs delivered the opinion report of Ronald J. Stewart dated August 31, 2013 (previously defined as the “**2013 Stewart Report**”)³⁶;
- (f) RPG delivered a responding opinion report of Izaak deRijcke dated March 25, 2014 (previously defined as the “**2014 deRijcke Report**”)³⁷;
- (g) In May 2015, the Plaintiffs’ indicated their intention to proceed with the action, but took no further steps to advance the action until January 2016³⁸;
- (h) In connection with this decertification motion, RPG delivered a supplementary report of Mr. deRijcke dated June 1, 2016 (previously defined as the “**2016 deRijcke Report**”).³⁹ Mr. Stewart delivered a responding report dated August 19, 2016 (previously defined as the “**2016 Stewart Report**”).⁴⁰ Mr. deRijcke delivered a reply expert report dated October 13, 2016 the (previously defined as the “**2016 deRijcke Reply Report**”).⁴¹

30. The 2016 deRijcke Report identified multiple categories of class members’ properties in respect of which the boundaries appear not to be defined by the 107.5 Contour and concluded that the boundaries of each property can only be ascertained on a case-by-case basis.⁴²

31. The Plaintiffs have not challenged that evidence with contrary evidence from Mr. Stewart. Rather, they persist in filing expert evidence going to a different – and ultimately irrelevant – question: whether the 107.5 Contour defines the limits of RPG’s flooding right as a matter of contract. Mr. Stewart has confirmed that regarding the Common Issue:

³⁶ Exhibit 1 to Stewart Cross-Examination, Supplementary Motion Record Vol.I-III, Tab 2A

³⁷ Motion Record Vol.I, Tab 2A

³⁸ Exhibits “A” and “B” to the Affidavit of M.Allen sworn May 31, 2016, Motion Record Vol.I, Tab 3, p.124 and 126-128

³⁹ Motion Record Vol.I, Tab 2B

⁴⁰ Exhibit 2 to the Stewart Cross-Examination, Supplementary Motion Record Vol. III, Tab 2B

⁴¹ Supplementary Motion Record Vol.I, Tab 1

⁴² 2016 deRijcke Report at paras. 1.3 and 5.2 – 6.2, Motion Record Vol.I, Tab 2B, p.47 and 56-58

- (a) he has not been asked to, and has not, made any determination of how many class members' properties are bounded by the 107.5 (or 108) Contour;
- (b) he has made no determination of where the boundaries of any class members' properties are; and
- (c) it does not follow that a breach of the licence of occupation will necessarily entail a trespass over some class members' properties.⁴³

PART III – ISSUES AND THE LAW

The Decertification Motion

32. This Honourable Court originally contemplated that the seemingly narrow legal question found in the Common Issue could be determined on a summary application.⁴⁴ The Plaintiffs, however, persuaded the Court that the determination of that Common Issue required a trial, preceded by expert reports and discovery.⁴⁵

33. It will be apparent from the evidence on this motion that the answer to the Common Issue (whether the 107.5-foot elevation referenced in the licence of occupation constitutes a fixed property line between public and private land which defines the class members' properties) will inevitably be "No". However, RPG should not be made to suffer the expense, delay and prejudice of the class action and trial process to get there. The evidence at this point shows that there is no common question and that this matter cannot, and should not, proceed as a class action. All parties, and the Court, should be relieved of the burden of dealing with a proceeding which does not meet the criteria for certification.

⁴³ Stewart Cross-Examination at p.16-17, Q.37-42 and p.105, Q.374, Supplementary Motion Record Vol. I, Tab 2, p.24-25 and 113

⁴⁴ Certification Decision at paras. 100, 126 and 127, Motion Record Vol.I, Tab 6, p.161 and 165-166

⁴⁵ Reasons of Smith J. dated March 20, 2013 at paras. 10 and 11, Supplementary Motion Record Vol. IV, Tab 6, p.798

The Test for Decertification

34. In order for a proceeding to be certified as a class proceeding, the Plaintiffs must satisfy the five conditions set out in section 5(1) of the CPA, the most relevant ones for purposes of this motion being as follows:⁴⁶

- (c) the claims of the class members raise common issues; and
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues.

35. Pursuant to section 10(1) of the CPA, a Court may decertify a class proceeding where it appears that the conditions for certification under section 5(1) of the CPA no longer exist.⁴⁷ On a decertification motion, in light of new evidence, subsequent facts or developments, a Court has the authority to reopen and reconsider the question as to whether the requirements for certification are still satisfied.⁴⁸ In so doing, the Court is required to “carefully scrutinize” the evidence as it has evolved to that stage of the proceeding, consider the merits of the positions taken by the parties and determine if there is a sufficient evidentiary basis to support the continued certification of the proceeding.⁴⁹

36. Certification motions are decided at an early stage of proceedings, prior to the exchange of productions, discoveries and exchange of expert reports. As a result, certification orders are

⁴⁶ CPA, section 5(1)

⁴⁷ CPA, section 10(1)

⁴⁸ *Pearson v. Inco Ltd.*, [2009] O.J. No. 780 (Ont. SCJ) at paras. 23 and 24, RPG Book of Authorities Tab 1

⁴⁹ *Smith v. Inco Ltd.* [2009] O.J. No. 5439 (Ont. SCJ) at paras. 24, 34, 40 and 44, RPG Book of Authorities Tab 2

“not intended to be cast in stone and [...] can be, in effect, revoked [...]”⁵⁰ As noted by Justice Cullity in *Pearson v. Inco*:

“It is not in the public interest – or in that of the litigants or the class – that a case should be permitted to proceed to trial if further evidence demonstrates that the litigation would be unmanageable, or that issues previously held to have commonality cannot in fact be decided on a class-wide basis.
The statutory objectives of the CPA – access to justice, judicial economy and behavioural modification – would not be advanced by allowing the action to continue under the CPA in such cases.”⁵¹
(emphasis added)

37. Although certification motions are procedural tools which are not intended to review the merits of a plaintiff’s claim, this Court has confirmed that on decertification motions brought at a later stage in the proceedings, once documentary productions and expert evidence have been exchanged, a Court must consider more than just the procedural aspects of the case but also consider the merits of the positions taken by the parties based on the evidence as it has evolved to date.⁵²

38. Based on these principles, RPG’s decertification motion ought to be granted. There is new evidence contained in the parties’ documentary productions and in the Stewart and DeRijcke expert reports which was not before this Honourable Court at the time of the motion for certification in March 2011 and which demonstrates that this class proceeding does not

⁵⁰ *Pearson, supra* at para. 26, RPG Book of Authorities Tab 1

⁵¹ *Pearson, supra* at para. 26, RPG Book of Authorities Tab 1

⁵² *Smith, supra* at paras. 40 and 42, RPG Book of Authorities Tab 2

satisfy the common issue and preferable procedure criteria set out in sections 5(1)(c) and (d) of the CPA.

39. The only expert evidence tendered on the Certification Motion – that of Terry Winhold proffered on behalf of RPG – spoke to the causes of shoreline erosion and flooding on Round Lake as well as to the investigation of these occurrences. There was no expert evidence at the time regarding the determination of class members’ property boundaries as a common issue; this evidence was only tendered after the Certification Motion in light of the newly formed Common Issue and following the parties’ exchange of documentary productions.

40. Had the evidence contained in the Stewart and DeRijke reports and the parties’ documentary productions been before this Honourable Court on the Certification Motion, the proceeding would not have been certified as the requirements of section 5(1)(c) and (d) of the CPA cannot be met.

The Common Issue is Neither Necessary to, Nor a Substantial Ingredient of, the Resolution of Each Class Member’s Claim

41. A determination of the Common Issue was intended to resolve the following legal issue: “whether a property line was created by the Licence of Occupation agreement [...] or merely established an elevation to which RPG was permitted to raise the level of Round Lake.”⁵³

42. In certifying the Common Issue, the Court was operating under the factual assumption that “an interpretation of the Licence of Occupation agreement would apply to all of the class

⁵³ Certification Decision at paras. 105 and 120, Motion Record Vol.I, Tab 6, p.162 and 164

members [...].”⁵⁴ It was the Court’s understanding that if the Common Issue was answered in the affirmative, such that a property line between public and private lands was created at the location of the 107.5 Contour, this would then define the property lines for all of the class members.⁵⁵ As the new evidence contained in the Stewart and DeRijcke reports and in the parties’ productions demonstrates, though, this understanding is, in fact, patently incorrect.

43. There are at least three significant categories of class members’ properties for which the 107.5 Contour appears to be entirely irrelevant to a determination of the property boundaries:

- (a) As discussed in paragraph 17 above, where HEPC acquired property (in fee simple) through Crown grants, these instruments did not employ contours as boundaries, but instead, used metes and bounds descriptions to define the extent of the property conveyed to HEPC. Examples of these properties derived from the evidence indicate that the upland owner’s property rights are bounded by, for example, the shore road allowance or a second strip of land adjacent to the shore road allowance which follows the shape of the shore road allowance.⁵⁶ Mr. Stewart identified approximately 9 of the original township lots around Round Lake which were originally conveyed to HEPC through a Crown grant.⁵⁷ This would translate into approximately 50 separate properties for which flooding rights were granted without any reference to the 107.5 Contour. Axiomatically, the private lands abutting the HEPC properties would also not have boundaries defined by the 107.5 Contour.
- (b) As discussed in paragraph 18 above, HEPC did not acquire flooding rights in respect of certain lots because the flooding did not exceed the inner limit of the shore road allowance.⁵⁸ Mr. Stewart admitted that for these properties, the upland

⁵⁴ Certification Decision at para. 100, Motion Record Vol.I, Tab 6, p.161

⁵⁵ Certification Decision at paras. 99-100, 105, 110, 113 and 120, Motion Record Vol.I, Tab 6, p.161-164

⁵⁶ 2016 Stewart Report at Tab 2, Supplementary Motion Record Vol. III, Tab 2B(2), p.569; PLA0000049, PLA0000050, PLA0000051, RPG0000037, PLA0000035, PLA0000054, RPG0000056, RPG0000057, PLA0000026, Supplementary Motion Record Vol. IV, Tab 5(B), (D), (E), (F), (G), (H), (N), (O), (P) p. 752-755, 757-760, 787-794; Stewart Cross-Examination p.86-88, Q.306-313, p.91-92, Q.320-326, p.93-94, Q.331 and 335, p.99, Q.351-353, Supplementary Motion Record Vol. I, Tab 2, p.94-96, 99-102 and 107

⁵⁷ 2016 Stewart Report at Tab 6, Supplementary Motion Record Vol. III, Tab 2B (6), p.582

⁵⁸ 2016 Stewart Report at paras. 5.3, 6.8 and 6.9, Supplementary Motion Record Vol. III, Tab 2B, p.563-565

owners would have received title up to the inner limit of the road allowance, without any reference to a contour line.⁵⁹ Mr. Stewart identified 10 of the original township lots around Round Lake for which HEPC did not acquire flooding rights.⁶⁰

- (c) Even where the flooding rights are determined by the 107.5 Contour, if the contour falls within the inner limits of the road allowance, the divide between the public and private lands will be the road allowance, not the 107.5 Contour.⁶¹ The Plaintiffs' expert acknowledged that in this instance, an excursion over the 107.5 Contour does not necessarily result in a trespass onto the private upland parcel because, for there to be a trespass, the water must cross not only the 107.5 Contour but also the inner limit of the shore road allowance, which can only be determined on an individual property by property basis.⁶² In this case, the question of whether the water passes the 107.5 Contour is irrelevant in determining trespass. This completely undermines the Court's understanding at the Certification Motion that if the Common Issue was answered in the affirmative (i.e.: the contour is the property line for all of the class members), encroachment of water over the 107.5 Contour line would be synonymous with encroachment of water onto the class members' property.⁶³ Mr. deRijcke has identified approximately 100 properties where the 107.5 Contour falls within the shore road allowance or is commensurate with the inner limit of the road allowance, but does not cross it.⁶⁴

44. Furthermore, the evidence is littered with a wide variety of other examples where, regardless of how the township lot boundaries were defined a century ago at the time of the

⁵⁹ Stewart Cross-Examination, p.42-45, Q.136-146, p.94-96, Q.337-339 and p. 97, Q.342-343, Supplementary Motion Record Vol. I, Tab 2, p.50-53, 102-105; see the uncoloured areas identified on Exhibit 5 to the Stewart Cross-Examination, Supplementary Motion Record Vol.IV, Tab 2E, p.587; PLA0000008, PLA0000131 and PLA0000134, Supplementary Motion Record Vol. IV, Tab 5 (A), (I), (J), p.751, 768-774

⁶⁰ 2016 Stewart Report at para. 6.8, Supplementary Motion Record Vol. III, Tab 2B, p.564

⁶¹ Stewart Cross-Examination, p.45, Q.148, Supplementary Motion Record Vol. I, Tab 2, p.53

⁶² Stewart Cross-Examination, p.59-61, Q.203-207 and 210, p.105, Q.373-374, Supplementary Motion Record Vol. I, Tab 2, p.67-69 and 113.

⁶³ Certification Decision at paras. 97-99, 104-105 and 120, Motion Record Vol.I, Tab 6, p. 161, 162 and 164

⁶⁴ 2016 deRijcke Report at paras. 5.3.1 – 5.3.2 and Appendix 8-10, Motion Record Vol.I, Tab 2B (8), (9) and (10), p. 56-57 and 102-115. The following are examples from Mr. deRijcke's report of surveys of properties where the 107.5 Contour falls within the shore road allowance: 2016 deRijcke Report at Motion Record Vol. I, Tab 2B (9), p. 105, 106, 112H and deRijcke Cross-Examination at p.74, Q.276-280, p.76, Q.286, Supplementary Motion Record Vol. IV, Tab 3, p.682 and 684

original Crown grants, over time and in connection with subsequent conveyances, subdividing or other transactions, property boundaries have come to be defined by reference to lines other than the 107.5 Contour Line. For example, there are numerous cases where class members' properties, in more recent years, appear to be defined with reference to the shore road allowance or the water's edge at the time of the recent survey, and are not based on the 107.5 (or 108) Contour, and certainly not the Boswell Line.⁶⁵

45. The Plaintiffs are unable to say which of the class members' property boundaries are defined with reference to the 107.5 Contour. The Plaintiffs' expert has not conducted a survey of the properties around Round Lake, has not determined the location of the current boundaries of the class members' properties and has not determined which, if any, class member's properties are today defined by the 107.5 Contour (or any contour line).⁶⁶

46. The above-noted examples are not an exhaustive list; there may be many more examples of individual properties or groups of properties which are not defined by the 107.5 Contour. Absent a survey of each individual class member's property, though, the Plaintiffs cannot say which, if any, properties are defined with reference to the 107.5 Contour.

47. Based on this evidence, there is no longer any basis in fact to conclude that the claims of the class members raise common issues as required under section 5(1)(c) of the CPA. For an

⁶⁵ 2016 deRijcke Report at paras. 5.2.1, 5.4.1-5.4.3 and Appendix 6, 7, 11, 13 and 15, Motion Record Vol.I, Tab 2B (6), (7), (11), (13) and (15), p.56-58, 100, 101, 116, 118 and 120; Stewart Cross-Examination at p.73-74, Q.256-263, p.79-80, Q.282-284, 290, p.84, Q.297-299 and Exhibit 7, Supplementary Motion Record Vol. I and IV, Tab 2 and 2(G), p.81-82, 87-88, 92 and p.605-608

⁶⁶ Stewart Cross Examination, p.16-17, Q.37-42 and p.50, Q.165-166, Supplementary Motion Record Vol.I, Tab 2, p.24-25 and 58; 2013 Stewart Report at para. A.2 and D.6.6, Supplementary Motion Record Vol. I, Tab 2A, p.117 and 150.

issue to be “common”, it must be *necessary* to the resolution of *each* class member’s claim and must also be a *substantial ingredient* of *each* class member’s claim in the sense that its resolution in favour of the class will be of substantial or critical importance to essential elements of the cause action asserted by all class members.⁶⁷

48. Whether the 107.5 Contour established a fixed property line between public and private lands is not a question necessary to all class members’ claims as that issue will not be relevant to all class members. The evidence does not support the fact that determining whether the 107.5 Contour establishes a fixed property line between public and private lands is required for all class members in order for them to make out their claims against RPG. The answer to the Common Issue will be irrelevant for those class members whose property boundaries are defined irrespective of the 107.5 Contour. As acknowledged by the Plaintiffs’ expert:

“Q. In order to determine whether there has been a trespass, because we know there are some properties around the lake where the 108 contour is not going to be their boundary, in those cases the issue is not whether the licence of occupation has been exceeded but whether there has been overflowing onto the land of the class member?

A. That’s correct.”⁶⁸

⁶⁷ *Hollick v. Toronto (City)*, [2001] S.C.J. No.67 at paras. 18 and 19, RPG Book of Authorities, Tab 3; *Western Canadian Shopping Centres Inc. v. Dutton*, [2000] S.C.J. No. 63 at paras. 39-40, RPG Book of Authorities, Tab 4; *Murphy v. BDO Dunwoody LP*, [2006] O.J. No. 2729 (Ont. SCJ) at paras. 36-38, RPG Book of Authorities, Tab 5; *Williams v. Mutual Life Assurance*, [2003] O.J. No.1160 (Ont CA) at paras. 45-48, RPG Book of Authorities, Tab 6; *Dennis v. Ontario Lottery and Gaming Corp.*, [2013] O.J. No. 3468 (Ont. CA) at paras. 58, 59, 68 and 70, leave to appeal refused, [2013] S.C.C.A No.373, RPG Book of Authorities, Tab 7

⁶⁸ Stewart Cross-Examination at p.61, Q.210, Supplementary Motion Record Vol. I, Tab 2, p. 69

49. A common issue which is irrelevant to certain class members is, by definition, neither necessary nor of substantial importance to their claims and therefore lacks the degree of commonality required under the CPA.⁶⁹

50. This is not a problem which can be solved by narrowing the class definition. The essential problem, based on the evidence of the Plaintiffs' own expert, is that nobody has been asked to, and nobody has, identified those properties that are defined by the 107.5 Contour.⁷⁰

51. Even if the resolution of the Common Issue were relevant to all class members, it would not be a substantial ingredient of the class members' claims for trespass. The only relevant question to their claim is where is each class member's property boundary at the point in time of the alleged trespass. Determining the property boundaries of each individual class member is the necessary element of each Plaintiff's claim for trespass. As noted in paragraph 42 above, in certifying the Common Issue, the Court effectively assumed that if the Common Issue was answered in the affirmative (that a property line between public and private lands was created at the location of the 107.5 Contour) this would then define the location of the property lines for all of the class members. As the expert evidence now demonstrates, though, regardless of the answer to the Common Issue, complex property by property assessments would still be required in order to determine the location of the property boundaries for each class member.⁷¹

⁶⁹ *Dennis v. Ontario Lottery and Gaming Corp.*, [2011] O.J. No. 5417 (Ont Div Ct.) at paras. 21, 29-33 and 66-67, aff'd [2013] O.J. No. 3468 (Ont. CA), leave to appeal refused, [2013] S.C.C.A No.373, RPG Book of Authorities, Tab 7

⁷⁰ Stewart Cross Examination, p.16-17, Q.37-42 and p.50, Q.165-166, Supplementary Motion Record Vol. I, Tab 2, p.24-25 and 58.

⁷¹ 2014 deRijcke Report at paras. 1.3.14, 5.1-5.4, 5.12, 5.17 and 9.1, Motion Record Vol.I, Tab 2A, p.16, 22-24, 26, 28 and 34; 2013 Stewart Report at paras. A.2 and D.6.6, Supplementary Motion Record Vol. I, Tab 2A, p.117 and

52. This assessment requires reviewing the best available evidence for each specific property, including, but not limited to, the individual land tenure documents for each property, past surveys and results of a thorough field investigation of all lines, boundaries and corners of the relevant land.⁷² What the origin or source of that boundary is – whether a metes and bounds description, a shoreline, a limit of a road allowance or a contour line – is but one piece of evidence for the surveyor. In some instances, the actual boundaries may end up being commensurate with the 107.5 Contour and in some instances certain evidence may be common among certain of the class member properties, but in all cases, the individual boundaries would still need to be determined separately for each property.⁷³ Answering the Common Issue does not advance any class members' claims; the same work will have to be done for every single class member to locate the boundary for each respective property.

53. Where, as in this case, the new evidence demonstrates the absence of many (if not all) of the benefits originally expected to be accomplished in the common issues trial, including judicial economy, advancement of the litigation and avoidance of duplicative findings of facts, decertification of the class proceeding is appropriate.⁷⁴

150; 2016 Stewart Report at para. 5.2, Supplementary Motion Record Vol. III, Tab 2B, p.562-563; Stewart Cross-Examination at p.34-35, Q.108-111 and p.40, Q.128-129, Supplementary Motion Record Vol. I, Tab 2, p.42-43 and 48

⁷² 2014 deRijcke Report at paras. 5.6, 5.8 and 5.12, Motion Record Vol.I, Tab 2A, p.24-27; 2016 deRijcke Report at footnote 8, Motion Record Vol.I, Tab 2B, p.52-53; 2016 deRijcke Reply Report at paras. 4.3-4.7, Supplementary Motion Record Vol. I, Tab 1, p.5-6; 2013 Stewart Report at para. B.26 and D.6.6, Supplementary Motion Record Vol.1, Tab 2A, p.125 and 150; 2016 Stewart Report at paras. 4.6 and 5.2, Supplementary Motion Record Vol. III, Tab 2B, p.562-563

⁷³ Stewart Cross-Examination at p.41, Q.133, Supplementary Motion Record Vol. I, Tab 2, p.49

⁷⁴ *Crooks v. CIBC World Markets Inc.*, [2016] N.S.J. No. 210 (N.S.S.C) at paras. 138-147 and 174-175, RPG Book of Authorities, Tab 8

The Class Proceeding is Not the Preferable Procedure as it Will Not Be An Efficient or Manageable Method of Advancing the Claims

54. For a class proceeding to be the preferable procedure for the resolution of the common issues under section 5(1)(d) of the CPA, it must represent a fair, efficient and manageable method of advancing the claim that is preferable to any alternative method.⁷⁵ Whether a class proceeding is the preferable procedure is judged by reference to the purposes of the CPA – judicial economy, behaviour modification and access to justice - and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.⁷⁶

55. Determining the manageability, fairness and efficiency of a class proceeding requires an assessment of the impact of any resolution of the proposed common issue on the claim as a whole. Where, as in this case, the Common Issue is negligible in relation to the numerous individual issues that will have to be resolved by the participation of each class member in individual trials about their specific factual circumstances, the resolution of the Common Issue will not significantly advance the action and the class proceeding will not be the preferable procedure.⁷⁷

56. For the reasons discussed above, the resolution of the Common Issue is not relevant for all of the class members and thus, by definition, does not advance the litigation for those class members. However, even in respect of those Plaintiffs for whom the Common Issue might be

⁷⁵ *Hollick, supra* at para. 28, RPG Book of Authorities, Tab 3

⁷⁶ *Hollick, supra* at paras. 27–30, RPG Book of Authorities, Tab 3; *Mouhteros v. DeVry Canada Inc.*, [1998] O.J. No.2786 (OCJ – Gen Div.) at para. 26, RPG Book of Authorities, Tab 9

⁷⁷ *Hollick, supra* at paras. 28, 30 and 32, RPG Book of Authorities, Tab 3; *Mouhteros, supra* at paras. 30-33, RPG Book of Authorities, Tab 9; *Price v. Panasonic Canada Inc.*, [2002] O.J. No. 2362 (SCJ) at paras. 44, 48, 50-53 and 64, RPG Book of Authorities, Tab 10; *Williams, supra* at paras. 51-55, 57, 58 and 60, RPG Book of Authorities, Tab 6

relevant, the resolution of the Common Issue would also not significantly advance the litigation when considered in relation to the remaining individual issues that would still need to be determined.

57. Evidence would still need to be adduced, for each individual property, as to where on the ground today the contour is in order for the Court to then be in a position to determine whether water has extended beyond the 107.5 Contour for any particular property.⁷⁸ The 107.5 Contour as depicted on Mr. Boswell's surveys (or on any survey) is but a mere graphic representation of the contour, but does not constitute the boundary itself. Determining, on the ground today, the location of the 107.5 Contour as it existed in 1917 will require an assessment of a wide variety of individualistic evidence relating to each property, including, but not limited to, surveys, topography and soil conditions at that particular location, vegetation at that location, wind and wave action on the lake at that location, orientation of that property's shoreline and the existence of man-made structures which may have been erected on the shoreline.⁷⁹ Regardless of the nature of the legal origin of title, the same investigation must be done for every property. The amount of evidence to be adduced and the nature of the forensic investigation to be undertaken would not be reduced by the answer to the Common Issue. It may superficially appear to be a question which could significantly advance the class members' claims, but in reality it does not.

⁷⁸ 2014 deRijcke report at para. 5.1, Motion Record Vol.I, Tab 2A, p.22-23; 2016 deRijcke Report at paras. 3.2-3.4, Motion Record Vol.I, Tab 2B, p.51-53; 2013 Stewart Report at para. D.6.1, Supplementary Motion Record Vol. I, Tab 2A, p.149; Stewart Cross-Examination at p.48-49, Q.158-162 and p.50, Q.167, Supplementary Motion Record Vol.I, Tab 2, p.56-58

⁷⁹ 2014 deRijcke report at paras. 7.6 and 7.7, Motion Record Vol.I, Tab 2A, p.31-32; deRijcke Cross-Examination at p.70-71, Q.264-268, Supplementary Motion Record Vol. IV, Tab 3, p.678-679; Stewart Cross-Examination at p.50-52, Q.168-179, Supplementary Motion Record Vol. I, Tab 2, p.58-60

58. This would be the case even if the drawings by Mr. Boswell were accurate and the best evidence of where the contour line was in 1917. However, any suggestion by the Plaintiffs that Mr. Boswell's survey work is the best available evidence for a surveyor to use to retrace the original position of the 107.5 Contour is without merit. As admitted by the Plaintiffs' own expert, a surveyor cannot automatically adopt one piece of evidence over others without first considering all the available evidence relating to each property and attempting to reconcile any apparent conflicts⁸⁰:

“Q. [...] We don't perforce adopt one line or the other. Somebody has to do a forensic investigation and determine for each property where are the proper boundaries in fact, and where would a certain elevation be in fact.

A. That's true. [...]”⁸¹

This is particularly the case where even Mr. Stewart considers that Mr. Boswell's work is not as accurate as the earlier survey work conducted by Mr. Hamilton.⁸²

59. The questionable reliability of Mr. Boswell's work is further underscored by the evidence that many past surveyors have not used or referred to the Boswell Line in plotting contour lines

⁸⁰ Stewart Cross-Examination at p.34-35, Q.108-111 and p.40, Q.128-130, Supplementary Motion Record Vol. I, Tab 2, p. 42-43 and 48. Also see 2016 deRijcke Reply Report at para. 4.8, Supplementary Motion Record Vol I, Tab 1, p.6-7 and deRijcke Cross-Examination at p.67-68, Q.252-256, Supplementary Motion Record Vol.IV, Tab 3, p. 675-676

⁸¹ Stewart Cross-Examination at p.40, Q.129, Supplementary Motion Record Vol.I, Tab 2, p.48

⁸² 2013 Stewart Report at paras. D.5.4-D.5.7, Supplementary Motion Record Vol. I, Tab 2A, p.145-146; Stewart Cross-Examination at p.17-18, Q.46, p.19, Q.52-54 and p.22, Q.66, Supplementary Motion Record Vol. I, Tab 2, p.25-27 and 30

for certain properties around Round Lake but have, instead, for example, measured the 107.5 or 108 foot elevation at the time the survey was being conducted using local datum references.⁸³

60. The resolution of the single Common Issue will not significantly advance the claim and the trial judge will be left with what, in effect, would be over 400 individual trials, rendering the class action completely unmanageable. When viewed in the context of the entire claim, the Common Issue is negligible in relation to the importance of the plethora of individual issues that still require determination. More so than the Common Issue, the individual issues are essential elements of all the class members' claims for trespass, the main ones being the assessments required to determine the location of each class member's property boundaries as they exist today and to determine whether there has been encroachment on each property. The multitude of individual trials will overwhelm any small advantage which may be derived from the trial of the sole Common Issue.⁸⁴ A class proceeding would be inimical to the principle of judicial economy given the duplicative fact-finding and legal analyses that will be required, and would not enhance access to justice as class members will be faced with significant costs to litigate their many important individual issues.⁸⁵

61. There would be no unfairness in denying certification, yet there would be a tremendous savings of judicial resources. The class members who do wish to pursue a claim have recourse to

⁸³ 2016 deRijcke Report at paras. 5.4.1-5.4.3 and Appendix 11,13 and 15, Motion Record Vol.I, Tab 2B (11), (13) and (15), p. 57-58, 116, 118 and 120; 2013 Stewart Report at paras. D.5.12, D.5.13, D.6.2 and Exhibit 46, Supplementary Motion Record Vol. I and III, Tab 2A and 2A(46), p. 147-149 and p.506-507; 2014 deRijcke Report at para. 5.10, Motion Record Vol.I, Tab 2A, p.25-26; Stewart Cross-Examination at p.70-72, Q.246-249, 251 and 254, p.76-77, Q. 273, p. 79-80, Q.285-288, Supplementary Motion Record Vol. I, Tab 2, p.78-80, 84-85 and 87-88.

⁸⁴ *Mouhteros, supra* at para. 33, RPG Book of Authorities, Tab 9

⁸⁵ *Price, supra* at paras. 44, 48, 50-53, RPG Book of Authorities, Tab 10; *Hollick, supra* at para. 32, RPG Book of Authorities, Tab 3; *Williams, supra* at paras. 54-55, RPG Book of Authorities, Tab 6

the *Boundaries Act*, which provides a specialized tribunal (the Director of Titles) to determine property boundaries, including disputed boundaries.⁸⁶ The class members who did wish to pursue claims would be free to co-operate and pool resources as they wish. They would be at liberty to, thereafter, pursue claims against RPG if so advised. These claims would be no less efficient than the convening of the individual trials within the class action. Indeed, a process which uses a specialized tribunal for determining class members' boundaries would be significantly more efficient.

PART IV – CONCLUSION AND ORDER SOUGHT

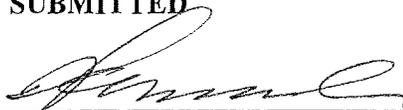
62. The Plaintiffs' pre-occupation with the importance of the 107.5 Contour is misplaced. The only relevant question in this proceeding is whether there has been flooding over the class members' properties, which can only be determined based on each property's boundaries as they exist today and the events relevant to that property. For many class members, the 107.5 Contour appears to be entirely irrelevant to a determination of whether there has been an encroachment onto their properties. In addition, the Common Issue does not sufficiently advance the litigation, leaving the class proceeding overwhelmed by individual issues. In short, the assumptions which underlay the Certification Order – that the Common Issue was in fact common and would significantly advance the claims of all class members – are erroneous.

63. For all of the foregoing reasons, it is respectfully requested that RPG's motion be granted, with costs, and the Certification Order set aside.

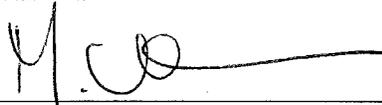
⁸⁶ Stewart Cross-Examination at p.105-107, Q.377-380 and Q.381-382, Supplementary Motion Record Vol. I, Tab 2, p.113-115; *Boundaries Act* R.S.O 1990, C.B. 10 at section 3

December 16, 2016

**ALL OF WHICH IS RESPECTFULLY
SUBMITTED**



Alan Mark



Melanie Ouanounou

**Lawyers for the Defendant,
Renfrew Power Generation**

SCHEDULE “A”**LIST OF AUTHORITIES**

1. *Pearson v. Inco Ltd.*, [2009] O.J. No. 780 (Ont. SCJ)
2. *Smith v. Inco Ltd.* [2009] O.J. No. 5439 (Ont. SCJ)
3. *Hollick v. Toronto (City)*, [2001] S.C.J. No.67
4. *Western Canadian Shopping Centres Inc. v. Dutton*, [2000] S.C.J. No. 63
5. *Murphy v. BDO Dunwoody LP*, [2006] O.J. No. 2729 (Ont. SCJ)
6. *Williams v. Mutual Life Assurance*, [2003] O.J. No.1160 (Ont. CA)
7. *Dennis v. Ontario Lottery and Gaming Corp.*, [2011] O.J. No. 5417 (Ont. Div. Ct.), aff’d [2013] O.J. No. 3468 (Ont. CA), leave to appeal refused, [2013] S.C.C.A No.373
8. *Crooks v. CIBC World Markets Inc.*, [2016] N.S.J. No. 210 (N.S.S.C)
9. *Mouhteros v. DeVry Canada Inc.*, [1998] O.J. No.2786 (OCJ – Gen Div.)
10. *Price v. Panasonic Canada Inc.*, [2002] O.J. No. 2362 (Ont. SCJ)

SCHEDULE “B”
RELEVANT STATUTES

Class Proceedings Act, 1992, S.O. 1992, c.6

Definitions

1. In this Act,

“common issues” means,

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; (“questions communes”)

[...]

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

[...]

Refusal to certify: proceeding may continue in altered form

7. Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,

- (a) order the addition, deletion or substitution of parties;
- (b) order the amendment of the pleadings or notice of application; and
- (c) make any further order that it considers appropriate. 1992, c. 6, s. 7.

[...]

Where it appears conditions for certification not satisfied

10. (1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5 (1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate. 1992, c. 6, s. 10 (1).

Proceeding may continue in altered form

(2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties. 1992, c. 6, s. 10 (2).

Powers of court

(3) For the purposes of subsections (1) and (2), the court has the powers set out in clauses 7 (a) to (c). 1992, c. 6, s. 10 (3).

Boundaries Act, R.S.O. 1990, C.B. 10

Application for confirmation of boundaries

3. (1) Where doubt exists as to the true location on the ground of any boundary of a parcel, an application, in the prescribed form, may be made to the Director to confirm the true location of the boundary on the ground. R.S.O. 1990, c. B.10, s. 3 (1).

Public highways

(2) The Minister of Transportation, the council of a municipality or an authority having jurisdiction over a public highway may apply to the Director, in the prescribed form, to confirm the true location of the boundaries on the ground of a public highway under its jurisdiction. R.S.O. 1990, c. B.10, s. 3 (2).

Who may apply

(3) An application to the Director under subsection (1) may be made by,

- (a) the owner of an interest in the parcel;
- (b) the council of the municipality in which the parcel is situate;
- (c) a minister of the Crown;
- (d) the Surveyor General of Ontario;
- (e) the Surveyor General of Canada; or
- (f) with the consent of the owner of an interest in the parcel, a surveyor. R.S.O. 1990, c. B.10, s. 3 (3).

[...]

Notice of application

7. The Director shall cause a notice of an application under this Act to be given in such manner and to such persons as the Director considers proper in the circumstances and the notice shall set out the purpose of the application and the time fixed for delivering objections to the Director and, where a copy of the plan is not included with the notice, the notice shall state the place where a copy of the plan may be inspected. R.S.O. 1990, c. B.10, s. 7.

Objection

8. (1) Any person desiring to object to the location of the boundary or boundaries to be confirmed, as shown on the plan of survey, shall deliver to the Director, by registered mail or by personal service within the time fixed by the notice of application, a written statement setting forth the nature and grounds of the objection. R.S.O. 1990, c. B.10, s. 8 (1).

Hearing

(2) Where a written statement of objection is received, the Director shall afford an opportunity for a hearing to determine the validity of the objection. R.S.O. 1990, c. B.10, s. 8 (2).

Confirmation without hearing

(3) Where the time specified in the notice of application has expired and no objection has been received, the Director, if he or she is satisfied by the application and the material filed in support thereof, may, without convening a hearing, confirm and, when the surveyor has complied with section 14, certify the location of the boundary or boundaries as shown on the plan of survey. R.S.O. 1990, c. B.10, s. 8 (3).

Hearing where Director is not satisfied by application

(4) Where the Director is not satisfied by the application and the material filed in support thereof, he or she may convene a hearing and require any person he or she considers necessary to appear at the hearing to give evidence. R.S.O. 1990, c. B.10, s. 8 (4).

Parties

(5) The applicant, any person who delivers a statement of objection under subsection (1) and such other persons as the Director may specify, are parties to the proceedings for the confirmation of the boundary or boundaries. R.S.O. 1990, c. B.10, s. 8 (5).

Notice of hearing

(6) The Director shall cause a notice of hearing under this section to be given, in a manner prescribed by the regulations, to the parties and to such other persons as he or she may specify, setting forth the time, place and purpose of the hearing. R.S.O. 1990, c. B.10, s. 8 (6).

Hearing and confirmation

9. (1) Upon the hearing convened under section 8, the Director may dispose of any objection in such manner as he or she considers just and equitable under the circumstances and may, by order, confirm the location of the boundary or boundaries as shown on the plan of survey, or, if he or she thinks proper to do so, may order that the survey and plan be amended in such manner as he or she may direct, in which case he or she may confirm the location of the boundary or boundaries as shown on the plan as so amended. R.S.O. 1990, c. B.10, s. 9 (1).

Recording of evidence

(2) The oral evidence taken before the Director at a hearing shall be recorded and, at the request of a party to the hearing, a copy of the recording shall be furnished to the party upon payment of the required fee. R.S.O. 1990, c. B.10, s. 9 (2); 1998, c. 18, Sched. E, s. 17.

[...]

Effect of certificate

15. (1) The boundaries confirmed and certified by the Director and defined by the monuments shown on the plan under this Act shall, despite any other Act, be deemed to be the true boundaries of the parcel. R.S.O. 1990, c. B.10, s. 15 (1).

Saving

(2) Nothing in this Act affects the establishment or re-establishment of lines under the *Surveys Act*, other than the boundaries confirmed and certified under this Act. R.S.O. 1990, c. B.10, s. 15 (2).

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Ottawa

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